In the HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARYORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO.254 OF 2007
IN
SUIT NO.2703 OF 2006

Rukmani Bherumal Wadhawan .. **Plaintiff**

vs

Veena Sikand & ors .. Defendants

Mr.J.P.Sen i/b Mr.Ashok Purohit for Plaintiff
Mr.K.T.Kukreja i/b M/s Kukreja & Co for Defendant nos. 1 to 3 (Applicants)

CORAM : SMT R.S.DALVI, J
DATE: 1st March, 2007.

P.C.

1. This suit came to be filed on 8th September, 2006 by a mother against her daughter, grandson, and son-in-law who lived in the premises admittedly owned by her alone for the recovery and restoration of certain jewelleries and an injunction restraining the defendants from entering into or remaining upon the suit premises. In the Notice of Motion taken out by the plaintiff, the defendants alleged that the suit was instituted at the instigation of the brother of defendant no. 1 who lived in Germany and that the plaintiff enjoys her life in her own way, she goes to club in the afternoon, plays cards

and gambles and keeps herself occupied whereas the defendant no. 1 was in spiritualism and had no source of livelihood.

2. Based upon the basic concept of ownership rights and upon the fact that the plaintiff as the sole owner and defendants were merely the gratituous licencees as family members and having no right, title and interest in the suit premises as enunciated in the case of Conrad Dias vs Joseph Dias AIR 1995 BOM 210, Justice Vazifdar who heard the ad interim injunction application passed an order dated 12thOctober, 2006 giving the defendants six months time to vacate the suit premises.

3. That order was carried in appeal. A settlement suggested by the Court was not agreeable to the defendants. Ad interim order came to be confirmed. The defendants have now taken out this Chamber summons for taking the suit off the file of the court as it is instituted without a next friend on

the premise that the plaintiff is of unsound mind and could not have instituted the suit herself. The defendants therefore seek an inquiry and order for the plaintiff to be examined by the Dean of a hospital with regard to her mental status and for a report of the Dean submitted to the Prothonotary and Senior Master of this Court.

4. It is the contention of the defendants that the plaintiff is of unsound mind and incapable of suing. The concept of incapability of suing is based upon the fundamental concept of incapability of contracting as per section12 of the Indian Contract Act. For persons incapable of contracting, specific provisions are made in the C.P.C..with regard to their right to sue. Consequently, under Order 32 of C.P.C. Minors and persons of unsound mind cannot themselves sue and specific procedure with regard to suits filed by or on their behalf are laid down. Under the provisions of Order 32 Rule 15 of C.P.C. Rules 1 to 14 that apply to minors would be made applicable to persons of unsound mind. This proceeds on the footing that

the person suing is admittedly of unsound mind and therefore incapable of suing himself or herself. Such a suit has, therefore to be filed through his or her next friend or a guardian ad-litem appointed by the Court. It is the case of the defendants that the plaintiff in the suit is one such person and she having sued herself,the suit must be struck off the records of the court upon an inquiry being made by a medical expert. The defendants, therefore contend that ad interim order passed by Justice Vazifdar and the appeal court confirming that order are themselves void and cannot be acted upon.

5. In support of such a novel contention, the defendants have set out 15 aspects relating to the plaintiff' satttitude and behaviour in the house, where the defendants live, to show and suggest to the court that she is incapable of suing. It is their case that the plaintiff suffers from"major mental disorder " and is "mentally ill " and " unable to protect her interest". What has to be seen by this court is not only whether the plaintiff is incapable of protecting her interest but whether she is

incapable of suing herself.

6. The very first thing the court is required to do is to see how the plaintiff who has sued herself is incapable of suing. Hence, this court desired to interview the plaintiff.

7. The interview was scheduled yesterday in my chambers at 2.15 p.m. The plaintiff, defendant no.1, plaintiff' s counsel and defendant' scounsel attended the chambers. The court asked some basic questions to the plaintiff. The plaintiff replied to the court about her age, how she passes her days, about her son,daughter, grandson as well as her neice and particulars relating to her residence and her daily activities. Unknown to the court before the papers and proceedings in the Notice of Motion taken out by the plaintiff as well as this Chamber Summons taken out by the defendants were shown to court, it has emerged that the plaintiff has given correct reasoned and quick answers to the court's querries. It is interesting to note that in the affidavit in reply to the Notice of

Motion taken out by the plaintiff which has been shown to court only today, a reference is made to the brother of defendanto.2 who lives in Germany upon whose behest the suit is alleged to have been filed. Innocently and in answer to the court's querries, the plaintiff mentioned to the court about her son who lives in Frankfurt, Germany and who carries on business there. Upon the court's querry as to what the plaintiff does the plaintiff replied to the court that she goes to clubs and plays cards to spend her days. This aspect is seen to be correct upon the statement in the affidavit in reply filed by defendant no. 1 in the earlier proceedings in the Notice of Motion taken out by the plaintiff showing the plaintiff going to clubs and playing cards and gambling and keeping herself occupied.

8. Upon the basic premise that the party incapable of contracting and incapable of suing must be supported by his or her next friend such a party is one who, pursuant to his or her unsoundness of mind,would be incapable of bringing on

record the facts which are material for the litigation that he or she has instituted. The plaintiff's answers, given to the court in presence of the counsel of both the parties as well as defendant no. 1, show her to be in a state of mind in which she knows and understands her position, her relatives and of those of her family members around her as well as of the suit property. She need not know more for the purposes of litigation which she has instituted. The 15 acts of the plaintiff maybe a pointer to her advanced age, or a disturbed state of mind but would not disentitle her to sue. Further she is liable to be cross examined by the defendants at the time of trial.

9. Prima facie, for the court to pass any order for striking off the plaint or to institute an inquiry with regard to her mental status the court must be prima facie satisfied that the person would be so incapable of handling his or her affairs as to take away from that person the right to sue and the competency to sue. The court finds neither the incapability nor incompetency prima facie.

10. I have been told by the plaintiff' scounsel that upon two contradictory statements made in the affidavit in reply to the Notice of Motion filed by the defendants that the suit has been instituted at behest of the son of the plaintiff and that the plaintiff cannot look after herself and is suffering from mental illness, Justice Vazifdar himself interviewed the plaintiff before the order came to be passed and which came to be upheld by the appeal court. The second interview before this court has not only shown an agile mind of the plaintiff in answering the court's querries relating to the question so put with regard to matters stated above, but has surprisingly brought out that the answers were true as stated in the affidavit of the defendants themselves with regard to two material questions.

11. No case for examining the plaintiff by a Dean of any hospital with regard to her mental status is at all made out. The defendants' advocate however, contended that such an inquiry is required to be held merely upon the statement made

by the defendants that the plaintiff suffers from such a mental illness.

12. In support of such a wild contention, he has relied upon a judgment in the case of Somnath vs Tipanna Ramchandra Jannu AIR 1973 BOMBAY 276. In that case, the plaint was filed by the next friend of the plaintiff. A statement was made in the plaint that the plaintiff was of unsound mind. Upon such a statement justification to sue by the next friend was made out. The provisions of Order 32 Rule 15 of C.P.C. which require the procedure under Order 15 Rules 1 to 14 of C.P.C. to be followed in such a case, was considered. The Court held that merely a friend suing upon a statement that the plaintiff was of unsound mind was not enough and if one person sues on behalf of another, upon such a statement the court was enjoined to make an inquiry in that behalf. The purpose and object of that ruling was that none can sue on behalf of another merely upon such a wild statement. That statement would have to be substantiated. In the absence of

such substantiation the right to sue by a party cannot be taken away. Reliance upon that judgment is not only entirely misconceived but designedly mischievous. It speaks of the procedure to be followed in an entirely contradictory case and circumstances. When the plaintiff herself sues and knows well that she is suing and is capable of answering the court's querries with regard to her litigation, she would need no other friend to protect her interest. It is for the court to protect her interest upon her case being made out.

13. Counsel on behalf of the defendants relied upon the case of Ramchandra Arya vs ManSingh AIR 1968 954 in which a decree passed against a person found to be a lunatic was held to be a nullity and the execution which proceeded resulting in a sale was held to be void and a nullity since the decree was passed against him without the appointment of a guardian. Only one observations in para 3 of that judgment is material to see that it is a completely contradictory case. The observation runs thus :

> " It has been found as a fact that Ram Lal was insane when Suit No. 354of 1939was instituted as well as when the house was sold in execution of the decree passed in that suit."

. In this case, the plaintiff is not found as a fact to be insane. Since even prima facie such a fact is not shown , no further inquiry need be instituted.

14. Chamber Summons is entirely malafide. It is dismissed with costs of Rs.10,000/- condition precedent.

(Smt R.S.Dalvi J)